Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SIMON C. FIREMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the courts of the First Circuit may disregard the mandate of Rule 22(b) of the Federal Rules of Appellate Procedure, which requires that a district court "shall either issue a certificate of appealability or state the reasons why such a certificate should not issue," and disregard the decisions of this Court spelling out the difference in standards between a question on the merits and the question of appealability. The action of the First Circuit in this case is in conflict with decisions of the Courts of Appeals of the Ninth and Tenth Circuits.

II. Whether Petitioner has presented "a question of some substance" for review by an appellate court, i.e., that the ballooned price of political advertising has rendered the $1,000 limit to contributions to a *federal* election campaign "different in kind" from the $1,000 limit approved twenty-three years ago in the plurality opinion in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) and enacted twenty-eight years ago in 2 U.S.C. § 441a and thus an unconstitutional abridgment of First Amendment rights. The intimately related question of the constitutionality of a $1,000 limit to contributions to a *state* election campaign is pending before this Court.[1]

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[1] *Nixon, et al.* v. *Shrink Missouri Government PAC, et al.*, No. 98-963, *cert. granted.*

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SIMON C. FIREMAN,

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UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioner Simon C. Fireman respectfully petitions that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the First Circuit in the above-entitled proceedings entered on February 25, 1999, and the Order of the First Circuit denying a Petition for a Hearing or Rehearing with a Suggestion the Case Be Heard or Reheard En Banc, entered on April 9, 1999.

OPINIONS BELOW

The Order of the First Circuit denying the Petition for a Hearing or Rehearing with a Suggestion the Case Be Heard or Reheard En Banc, dated April 9, 1999, is reprinted in the Appendix attached hereto at App. 27a.

The Order of the Court of Appeals for the First Circuit denying an Application for a Certificate of Appealability, dated February 25, 1999, of which review is sought, is reprinted at App. 1a.

The Order of the District Court denying an Application for a Certificate of Appealability, dated October 22, 1998, is reprinted at App. 3a.

The Opinion on the merits of the United States District Court for the District of Massachusetts (Young, J.), *Fireman* v. *United States*, 20 F. Supp. 2d 229 (D.Mass. 1998), dated September 15, 1998, is reprinted at App. 5a.

JURISDICTION

The jurisdiction of this Court to review the Order of the First Circuit, dated and entered February 25, 1999, affirming the Order of the District Court for the District of Massachusetts of September 15, 1998, and the Order of the First Circuit denying a Petition for a Rehearing, dated and entered April 9, 1999, is invoked pursuant to 28 U.S.C. § 1254(1). *See Hohn* v. *United States*, 118 S.Ct. 1969 (1998).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment of the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

2 U.S.C. § 441a provides:

> (a) *Dollar limits on contributions*
>
> (1) No person shall make contributions—
>
> (A) to any candidate and his authorized political committees with respect to any election for federal office which, in the aggregate, exceed $1,000;

RULES INVOLVED

Rule 22(b) of the Federal Rules of Appellate Procedure provides:

> In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment *must* either issue a certificate of appealability *or state why a certificate should not issue.* The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(Emphasis added.)

Interim Local Rule 22.1 of the Court of Appeals for the First Circuit provides:

> Fed. R. App. P. 22(b) is supplemented as follows:
>
> (a) The procedure set forth in Fed. R. App. P. 22(b) shall apply to requests for certificates of appealability in actions under 28 U.S.C. § 2254 and 28 U.S.C. § 2255.
>
> (b) In this circuit, ordinarily neither the court nor a judge thereof will initially receive or act on a request for a certificate of appealability if the district judge who refused the writ is available unless an application has first been made to the district court judge. A petitioner wishing to appeal from the denial of a § 2254 or § 2255 petition must file a timely notice of appeal and should promptly apply to the district court for a certificate of appealability. If the district court grants a certificate of appealability, it must state which issue or issues satisfy the standard set forth in 28 U.S.C. § 2253(c)(2). *If the district court denies a certificate of appealability, it shall state the reasons why the certificate should not issue.*
>
> (c) Once the district court grants or denies a certificate of appealability, the petitioner should promptly apply to the court of appeals for issuance of a certificate of appealability.

> The motion should be accompanied by a copy of the district court's order and a memorandum giving specific and substantial reasons, and not mere generalizations, why a certificate should be granted. Ten days after the district court file has been received in this court, the clerk will present the record to the court, with or without a separate motion for a certificate of appealability addressed to that court. If no sufficient memorandum has been filed by that time, the certificate may be denied without further consideration. The effect of a denial is to terminate the appeal.

(Emphasis added.)

STATEMENT OF THE CASE

On October 15, 1997, Petitioner filed a Motion pursuant to 28 U.S.C. § 2255, claiming his conviction under 2 U.S.C. § 441a was unconstitutional, as the Federal Election Campaign Act limiting contributions as enacted and applied in his case violated his rights of freedom of expression and association guaranteed by the First Amendment to the United States Constitution. He also argued that the plurality decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), upholding as constitutional the $1,000 limitation on contributions to federal candidates, was outdated by virtue of the documented and extraordinary increase in costs in political advertising, in addition to inflation, since 1976.

Hearings were held in the district court of the District of Massachusetts (Young, J.) on October 14, 1997, and December 15, 1997, at which it was several times suggested by the district judge that a record would be established and that the district court would likely be a "way station" to appellate review of the issues presented and the continued viability of *Buckley* v. *Valeo, supra.* (App. 29a-30a).

On September 15, 1998, the district court issued a Memorandum and Order denying the Applicant's Motion, *Fireman* v. *United States*, 20 F.Supp. 2d 229 (D.Mass. 1998) (App. 5a).

On October 21, 1998, the Petitioner filed an Application for a Certificate of Appealability in the district court to which the government filed no opposition. FRAP Rule 22 (b) requires that a district judge "*shall* either issue a certificate of appealability or *state the reasons why such a certificate should not issue.*" (emphasis added). Interim Local Rule 22.1(b) of the Court of Appeals for the First Circuit requires, "If the district court denies a certificate of appealability, it *shall state the reasons* why the certificate should not issue." (emphasis added). On October 22, 1998, the district court disregarded these mandatory requirements and denied the Application for a Certificate of Appealability, stating only, "Denied for the reasons set forth in the Court's memorandum." (App. 3a). The Court issued no "memorandum" other than its original Memorandum and Order of September 15, 1998 (App. 5a).

Pursuant to 28 U.S.C. § 2253(c) and FRAP Rule 22, the Petitioner applied to the Court of Appeals for the First Circuit for a Certificate of Appealability. The First Circuit refused to address the district court's failure to comply with the

mandatory requirement of Rule 22(b), although that failure was highlighted by the Petitioner in his Application for a Certificate of Appealability to the Court of Appeals. Instead, as far as enabling this Court to review the matter, it made matters worse. On February 25, 1999, the First Circuit issued an Order denying the Application, "*Essentially* for the reasons given by the district court in its memorandum and order, *Fireman* v. *United States*, 20 F. Supp. 2d 229 (D. Mass. 1998)." (App. 1a) (emphasis added).

On April 9, 1999, the First Circuit denied a Petition for a Hearing or Rehearing with a Suggestion that the Case Be Heard or Reheard En Banc (App. 27a).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS FOR THE FIRST CIRCUIT IS IN DIRECT CONFLICT WITH RULE 22(B) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, THE DECISIONS OF THIS COURT, AND THE DECISIONS OF THE COURTS OF APPEALS FOR THE NINTH AND TENTH CIRCUITS IN ITS REFUSAL TO COMPLY WITH THE MANDATE OF THAT RULE REQUIRING A STATEMENT OF REASONS BY THE DISTRICT COURT FOR THE DENIAL OF A CERTIFICATE OF APPEALABILITY.

A. *This Court Should Exercise Its Supervisory Powers And Require That The Courts Of The First Circuit Comply With The Mandate Of Rule 22(b).*

Rule 22(b) of the Federal Rules of Appellate Procedure is clear and mandatory — "[T]he district judge who rendered

the judgment *must* either issue a certificate of appealability *or* state why a certificate should not issue." (emphasis added). The district judge in this case did not do so, and the Court of Appeals for the First Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 10 of the Rules of the Supreme Court.

There needs to be uniformity in the federal courts on matters of procedure and appealability. *Hanna* v. *Plumer*, 380 U.S. 460, 463 (1965) ("Because of the threat to the goal of uniformity of federal procedure posed by the decision below, we granted certiorari."); *Firestone Tire & Rubber Company* v. *Risjord*, 449 U.S. 368, 373 (1981) ("We granted certiorari to resolve a conflict among the Circuits on the appealability question.") (motion to disqualify opposing counsel).

This Court should exercise its supervisory powers and require that the courts of the First Circuit comply with the mandate of Rule 22(b).The rule of law requires that federal judges as well as parties abide by clear and mandatory rules, particularly FRAP Rule 22(b), with its wide impact on all habeas corpus petitions and the fair administration of justice.

B. *The First Circuit And The District Court Have Refused To Follow The Decisions Of This Court Which Spell Out The Difference In Standards Between A Question On The Merits And The Question Of Appealability.*

The standard for the granting of a certificate of appealability is *not* that the applicant should prevail on the merits, but that a "question of some substance" is presented.

> In requiring a question of some substance ... *obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor.* Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.

Barefoot v. *Estelle*, 463 U.S. 880, 893 (1983) (emphasis added). Also, *Lozada* v. *Deeds*, 498 U.S. 430 (1991).

The district court in this case completely failed to comply with these requirements. It stated solely that the Application for a Certificate of Appealability was "Denied for the reasons set forth in the Court's memorandum." (App. 3a). This statement is wholly insufficient. The district court's memorandum addressed only whether the Petitioner should prevail on the merits, and did not discuss *at all* the different standards for appealability delineated and mandated by this Court in *Barefoot* v. *Estelle, supra*, and *Lozada* v. *Deeds,*

supra.[2] Given that this Court has clearly enunciated that the standards for a decision on the merits are *different* from the standards for appealability, the mandate of Rule 22(b) that there shall be a statement of reasons for the denial of a certificate of appealability must require more than a statement "for the reasons expressed on the merits."

The failure of the district court to comply with the Rules was highlighted by the Petitioner in his Application to the First Circuit. The First Circuit denied that the Application, "*Essentially* for the reasons given by the district court in its memorandum and order." (App. 1a) (emphasis added). It thereby also failed to address the standards of appealability, despite being specifically asked to do so. Because the courts of the First Circuit have failed and refused to follow this Court's decisions on the standards and showing to be made for a certificate of appealability, as distinct from a showing

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[2] The standards of appealability have been met. It is at least "debatable among jurists of reason" whether the reduced value of $1,000 in political campaign purchasing power from 1976 to the present renders the $1,000 limit now unconstitutional. There was an intelligent debate on the issue in the Eighth Circuit between the opinion-writing judge and the concurring judge in *Shrink Missouri Government PAC, et al.* v. *Richard Adams, et al.*, 161 F.3d 519 (8th Cir 1998) (*cert. granted*). Even in *Buckley* v. *Valeo* itself the issue was debated. The decision was complicated and complex, with actually *five* dissenting opinions. That sharply divided court has been almost fully replaced.

The second factor is also met. A court *could* resolve the issue differently. *Shrink, supra*.

The third factor is also met. The question is "adequate to deserve encouragement to proceed further." In fact, the district court in this case in open court repeatedly acknowledged that the issue was substantial but felt bound by *Buckley* and encouraged appellate review, stating, *inter alia*, "in face of *Buckley*, am I not simply a way station to appellate review?" (App. 29a-30a).

sufficient to prevail on the merits, certiorari should be granted. *United States* v. *Doe*, 465 U.S. 605, 610 (1984); *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 926 (1982); *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. 728, 733 (1982); *Henderson* v. *Kibbe*, 431 U.S. 145, 152 (1977); Rule 10(c) of the Supreme Court ("a United States court of appeals has decided ... an important federal question in a way that conflicts with relevant decisions of this Court.")

C. *There Is A Direct Conflict Between The First Circuit And The Ninth And Tenth Circuits On Compliance With Rule 22(b).*

In *Gardner* v. *Pogue*, 558 F.2d 548, 550 (9th Cir. 1977), the Ninth Circuit stated, "[FRAP 22(b)] *imposes a clear responsibility* upon the district judge who rendered the judgment to issue either a certificate or a statement *detailing his reasons* for declining to confer one." (emphasis added).

In *Herrera* v. *Payne*, 673 F.2d 307, 308 (10th Cir. 1982), the district court had denied the request for a certificate of appealability with an order which found "no substantial issue of law for review as set forth in the memorandum opinion filed herein." The district judge as respondent in that case argued that "FRAP 22(b) does not require more than the referenced order, i.e., that when the trial court adopts the magistrate's findings and recommendations as a whole, the reasons for denying the certificate of probable cause may be found in the magistrate's report." *Ibid.* The Court of Appeals for the Tenth Circuit "disagreed," concluding, "*Clearly* the rule imposes a responsibility on the district judge to issue a

certificate or a statement *detailing his reasons* for declining to confer one." *Ibid.* (emphasis added). "[T]he proper exercise of that discretion *cannot adequately be reviewed* where no reasons for that determination have been given." *Ibid.* (emphasis added).

The First Circuit is in direct conflict with the Ninth and Tenth Circuits. The district court below did not give reasons for its Order denying appealability, referring only to its Memorandum on the merits, and as a result that Order cannot adequately be reviewed. Then, the First Circuit made matters *worse*, denying appealability "[*e*]*ssentially* for the reasons given by the district court in its memorandum and order [on the merits]." (App. 1a). (emphasis added). Review of the Order of the First Circuit is therefore *impossible*.

This Court should grant certiorari pursuant to Rule 10(a) of the Supreme Court (conflict with another circuit). The administration of justice cannot tolerate such a conflict, particularly where the words of FRAP 22(b) have such a clear, plain, and mandatory meaning.

II. THE CONSTITUTIONALITY OF A $1,000 LIMIT ON CONTRIBUTIONS TO A STATE ELECTION CAMPAIGN IS PENDING BEFORE THIS COURT, AND THE EQUALLY IMPORTANT ISSUE OF THE CONSTITUTIONALITY OF A $1,000 LIMIT ON CONTRIBUTIONS TO A FEDERAL ELECTION CAMPAIGN SHOULD BE HEARD WITH IT.

In *Shrink Missouri Government PAC, et al.* v. *Richard Adams, et al.*, 161 F.3d 519 (8th Cir. 1998), the Court of Appeals for the Eighth Circuit held that a $1,000 limit on con-

contributions to a *state* election campaign was unconstitutional (with the opinion-writing judge and the concurring judge disagreeing on the constitutional effect of the greatly decreased value of $1,000 since *Buckley* v. *Valeo* was decided in 1976). Certiorari was granted in that case on January 25, 1999,[3] and that issue is now pending before this Court. The question in the instant case of the continued constitutionality of a $1,000 limit on contributions to *federal* campaigns is intimately related and, affecting every candidate for federal office and every citizen, is of equal, or greater, importance.[4] Certiorari should be granted in this case and the two questions heard together next term.

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[3] Now under the name of *Jeremiah W. (Jay) Nixon, et al.* v. *Shrink Missouri Government PAC, et al.* (No. 98–963).

[4] Connolly, "How Low Can You Go? State Campaign Contribution Limits and the First Amendment," 76 Boston University Law Review 483, 532 (1996):

> In this respect, a court should be sensitive to several important differences between national, state, and local elections, differences that compensate for the effects of lower contribution limits. First, campaign costs at the state level are lower than at the national level. Candidates for state office need only appeal to a comparatively smaller electorate within a smaller geographical area. Unlike national candidates, state candidates need not necessarily rely on expensive media outlets to reach the public. A second and perhaps less obvious difference between national and state elections concerns the risk of improper access to candidates via campaign contributions. Given the smaller scale on which state campaigns operate, the same contribution in the state context could conceivably "buy" greater access than to a national candidate. At the state level,

Dissenting in part in *Buckley* v. *Valeo, supra* at 241, Chief Justice Burger pointed out that what he saw as the Federal Election Campaign Act's unconstitutional limitation on political speech would only worsen in the future, due to "the rapid inflation in the cost of political campaigning." These inflationary fears have now been fully realized. The record shows that after a quarter of a century of inflation and ballooned costs in political advertising, the $1,000 limit on contributions to federal election campaigns is outdated, unreasonably restrictive, and results in an unconstitutional limitation on political speech.

In *Buckley, supra* at 19, this Court recognized, "The electorate's increasing dependence on television, radio and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." The tremendous increase in the cost of mass media political advertising is critically determinative.

The cost of a full-page newspaper advertisement was addressed as significant in *Buckley* v. *Valeo, supra* at 21, n.20, where this Court stated, "The record indicates that, as of January 1, 1975, one full-page advertisement in a daily edi-

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> less can get you more. Accordingly, the reality and appearance of corruption is arguably triggered at a lower level. Moreover, the closer physical proximity of donors and local — as opposed to national —candidates bears greater significance for state efforts to foster public confidence and participation in the electoral process.

A *fortiori, cert.* should be granted on the constitutionality of the $1,000 federal campaign contribution limit.

tion of a certain metropolitan newspaper [the Washington Post] cost $6,971.04 — almost seven times the annual limit on expenditures relative to a particular candidate imposed on the vast majority of individual citizens and associations by § 608(e)(1)." As the evidence submitted to the courts in the instant case below in the Applications for a Certificate of Appealability demonstrates, the current cost of a full-page advertisement in a daily edition of the Washington Post has skyrocketed to *$62,964 — an increase of 800%.* A $1,000 contribution toward a $62,964 advertisement today is equivalent to a $110 contribution toward a $6,971 advertisement in 1976. Surely $110 would have been ruled unconstitutional as a contribution limitation in a presidential campaign in 1976.[5]

The increases in advertising costs of six of the nation's major newspapers, taken from the Published Rate Cards of those newspapers and submitted in evidence below, reflect an average percentage increase of 643%. In other words, a $1,000 contribution *today* to defray the cost of one one-page advertisement in a major daily newspaper is equivalent to, on average, a $135 contribution in 1976. The following chart, reprinted from the expert's Affidavit submitted to the courts

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[5] Also in *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 296, n.5 (1981), this Court cited the cost of a full page newspaper political advertisement, in the course of its review of an ordinance placing limitations of $250 on contributions to committees formed to support or oppose ballot measures submitted to popular vote. In finding that the ordinance unconstitutionally contravened the First Amendment right of associated expression, the Court noted, "The value of the right to associate is *illustrated by the cost of reaching the public ... The cost of a full-page advertisement* in a Berkeley area newspaper, the Independent Gazette, was $1,620." (Emphasis added).

below in the Applications for a Certificate of Appealability (App. 31a), shows the extraordinary increase in advertising rates in major newspapers since the *Buckley* decision in 1976:

	1976 Page Cost	1997 Page Cost	% Cost Increase
Boston Globe			
Weekday	$6,829	$36,603	436%
Sunday	7,772	43,520	341%
NY Times			
Weekday	$12,288	$73,710	500%
Sunday	14,568	82,668	467%
Washington Post			
Weekday	$6,971	$62,964	803%
Sunday	7,713	85,351	1010%
LA Times			
Weekday	$ 9,000	$75,400	738%
Sunday	10,800	93,428	765%
SF Chronicle			
Weekday	$7,248	$45,666	530%
Sunday	8,741	53,664	514%
Chicago Tribune			
Weekday	$8,183	$59,976	633%
Sunday	9,824	84,168	757%

Television costs have also increased enormously during the last twenty years. As shown in the Affidavit (App. 35a), the cost of reaching the same number of network TV (ABC, CBS and NBC) viewers has risen, on average, 381% since 1977. A $1,000 contribution today, then, defrays the cost of the same amount of network TV advertising as a $208 contribution in 1977.

These "economic truths," acknowledged as such by the district court below, *Fireman* v. *United States, supra* at 236 (App. 23a), have an impact so obvious that the First Circuit took judicial notice of the "ballooning" costs of political advertising in *N.H. Right to Live Political Action Com.* v. *Gardner*, 99 F.3d 8, 19 (1st Cir. 1996).

The Petitioner has presented a question of manifest substance, importance, and appealability. Economic truths must now be translated into judicial truths: the $1,000 limit on federal as well as state contributions is outdated and unconstitutional, and certiorari on this issue should be granted.

CONCLUSION

Therefore, for the foregoing reasons and authorities, a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: June 10, 1999

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APPENDIX A.

United States Court of Appeals
For the First Circuit

No. 98-2057

SIMON C. FIREMAN,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

Before
Boudin, Circuit Judge,
Campbell, Senior Circuit Judge,
and Stahl, Circuit Judge.

ORDER OF COURT

Entered: February 25, 1999

Essentially for the reasons given by the district court in its memorandum and order, Fireman v. United States, 20 F.

Supp. 2d 229 (D. Mass. 1998), the request for a certificate of appealability is denied and this appeal is terminated.

By the Court:

PHOEBE MORSE

Clerk.

Certified Copies: Hon. William G. Young and Clerk Anthony Anastas
cc: Messrs. Goldings, Jacobs, O'Connor

APPENDIX B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SIMON C. FIREMAN,
Plaintiff

v.

UNITED STATES OF AMERICA,
Defendant

Civil Action No. 97-11188-WGY
YOUNG D.J.
MOTION DENIED for the reasons set forth in the Court's memorandum.
/s/ William G. Young
U.S. District Judge
Oct. 22, 1998

PETITIONER'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. §2253(c) and F R AP Rule 22, the Petitioner Simon C. Fireman hereby respectfully applies for a certificate of appealability from the denial of his Motion pursuant to 28 U.S.C. §2255.

I. STATEMENT OF PRIOR PROCEEDINGS

On October 15, 1997, Petitioner filed a motion pursuant to 28 U.S.C. §2255, claiming his conviction under 2 U.S.C. §441a was unconstitutional, as the Federal Election Campaign Act limiting contributions as enacted and applied is this case violated his rights of freedom of expression and as-

sociation guaranteed by the First Amendment to the United States Constitution.

On September 15, 1998, this Court issued a Memorandum and Order denying Petitioner's Motion.

On September 17, 1998, Petitioner filed a Notice of Appeal from the aforesaid Memorandum and Order.

DOCKETED

APPENDIX C.

Simon C. FIREMAN, Plaintiff,

v.

UNITED STATES of America, Defendant.

Civil Action No. 97-12305-WGY.

United States District Court,
D. Massachusetts.

Sept. 15, 1998.

Defendant petitioned to have his sentence vacated, set aside, or corrected on the ground that the Federal Election Campaign Act's (FECA) $1000 contribution limitation, under which defendant was prosecuted, was unconstitutional. The District Court, Young, J., held that limitation did not violate defendant's First Amendment rights of freedom of expression and association.

Petition denied.

Morris M. Goldings, MA, Richard S. Jacobs, Mahoney, Hawkes & Goldings, Boston, MA, for plaintiff.

MEMORANDUM AND ORDER

YOUNG, District Judge.

Pursuant to 28 U.S.C. § 2255, Simon C. Fireman ("Fireman") seeks to have his sentence vacated, set aside, or corrected on the grounds that the sections of the Federal Election Campaign Act ("FECA") under which he was prosecuted violate his First Amendment rights of freedom of expression and association under the United States Constitution both on their face and as applied.[1] Fireman also argues that the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) ought today be disregarded by this Court because that decision, upholding as constitutional the $1,000 limitation on direct or indirect contributions by individuals and groups to any single candidate or the candidate's authorized committee, with respect to any election for federal office, "severely undermine[s] to a material degree the potential for robust and effective discussions of candidates and campaign issues by individual citizens, associations, the press, candidates, and political parties." Plt.'s Brief at 7.

BACKGROUND

Petitioner Fireman filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 regarding a sentence entered by this Court on October 23, 1996, following a guilty plea. Fireman pled guilty to:

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[1] His motion states, in pertinent part: "The Federal Election Campaign Act limiting contributions as enacted and as applied in this case violated Movant's rights of freedom of expression and association guaranteed by the First Amendment to the United States Constitution. . . ."

1. Conspiracy to interfere with the lawful functions of the Federal Election Commission and to knowingly and willfully make contributions in the name of third persons in violation of 18 U.S.C. § 371 (Count 1);

2. Making contributions in the name of an individual other than the true donor in violation of 2 U.S.C. §§ 441a(f) and 437g(d) (Counts 2-8);

3. Making contributions in excess of the $1,000 statutory limit on campaign contributions to any candidate in violation of 2 U.S.C. §§ 441a(a)(1) and 437g(d) (Counts 71-72);

4. Making contributions in excess of the $25,000 statutory limit on aggregate campaign contributions in violation of 2 U.S.C. §§ 441a(a)(3) and 437g(d) (Count 73).

He was then sentenced to probation for a term of one year, the first six months to be served in home confinement with specific restrictions, and to pay a fine of one million dollars ($1,000,000) along with a special assessment of $300.

On May 27, 1997, Fireman filed a Complaint for Declaratory Relief seeking a declaration that the filing of his proposed section 2255 motion would not breach his plea agreement and an injunction against the U.S. Attorney's office prohibiting it from bringing dismissed or further criminal charges against Fireman if he files the motion. The United States moved to dismiss the Complaint. On October

14, 1997, this Court denied as moot the motion to dismiss and instructed Fireman that he could file a section 2255 motion without consequence. Thereafter, on October 15, 1997, Fireman filed this section 2255 motion.

DISCUSSION

A. Standing

In its response to Fireman's motion, the United States argues that Fireman lacks standing to challenge the constitutionality of his conviction under section 315 of the Federal Election Campaign Act, the part of the Act that imposes contribution limits. That part of his conviction relates to counts 71-73 for which, the United States claims, Fireman only received a fine and has never been "in custody." *See Smullen v. United States*, 94 F.3d 20, 25-26 (1st Cir.1996) (holding that a petitioner who is rightfully imprisoned cannot challenge the imposition of a fine or restitution under section 2255). The United States' interpretation of the sentence imposed on Fireman following his plea of guilty is incorrect. A review of the judgment of conviction and the criminal docket sheet shows that this Court imposed the same penalty for each count to which Fireman pled guilty, the sentence on each count to run concurrently, one with the others. *See* Pet'r's Reply to Government's Further Mem., Attach. 1 & 2. Fireman's section 2255 motion challenges not only the fine but the entire sentence and the jurisdiction of this Court to impose the sentence based on the unconstitutionality of FECA. Fireman thus has standing to challenge his conviction and sentence pursuant to 28 U.S.C. § 2255.

B. Procedural Default

[1-4] In its response to Fireman's motion, the United States argues that Fireman's failure to raise his constitutional issue prior to the entry of his plea constitutes procedural default barring collateral attack. The Court disagrees. A valid guilty plea does not waive jurisdictional defects. *See, e.g., United States v. Broce*, 488 U.S. 563, 569, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989); *Valencia v. United States*, 923 F.2d 917, 921 (1st Cir. 1991). "[A] plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the state may not constitutionally prosecute." *Menna v. New York*, 423 U.S. 61, 62 n. 2, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (per curiam). Fireman's claim that the statute under which he was charged is unconstitutional raises a jurisdictional question. If the statute is unconstitutional, then the information on its face failed to state a federal offense and this Court had no original subject matter jurisdiction. *See Ex Parte Siebold*, 100 U.S. 371, 376-77, 25 L.Ed. 717 (1880); *O'Leary v. United States*, 856 F.2d 1142, 1143 (8th Cir.1988). Fireman may raise this jurisdictional defect in a section 2255 motion, even when this claim was not raised on direct appeal. *See United States v. Harper*, 901 F.2d 471, 472 (5th Cir.1990); *United States v. Prince*, 868 F.2d 1379, 1383 (5th Cir.1989); *Robinson-Munoz v. United States*, 819 F.Supp. 1136, 1144 (D.P.R.1993). A guilty plea does not preclude raising a constitutional claim on collateral review challenging "the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge v. Perry*, 417 U.S. 21, 30, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), *rev'd on other grounds, Bordenkircher*

v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) (petitioner challenged his indictment after the entry of a guilty plea and without a direct appeal on the grounds that the indictment violated his due process rights).

The United States argues that even if Fireman can file a section 2255 motion, his ability to obtain relief under this motion is barred by his procedural default, pursuant to *United States v. Frady*, 456 U.S. 152, 167-68, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) (*Frady* teaches that to obtain collateral relief based on trial errors to which no contemporaneous objection was made as required by Fed.R.Crim.P. 30, a convicted defendant must show cause and actual prejudice). *See also Davis v. United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973) (petitioner's failure to object to the composition of the grand jury prior to trial, as required by Fed.R.Crim.P. 12[b][2], constituted waiver from which relief could be granted only upon a showing of cause and actual prejudice). The Government's reliance on *Frady* is misplaced. "In each of these cases, the Supreme Court found a procedural default and applied the cause and prejudice standard only after the defendant had violated a specific procedural rule by failing to raise his claim." *English v. United States*, 42 F.3d 473, 477 (9th Cir.1994). Here, there is no procedural rule that required Fireman to raise his jurisdictional claim prior to the plea under penalty of default. Federal Rule of Criminal Procedure 12(b)(2) does not apply to

Fireman.[2] This rule "applies to both procedural and constitutional defects in the institution of prosecutions *which do not affect the jurisdiction of the trial court.*" *Davis*, 411 U.S. at 236-37, 93 S.Ct. 1577, 36 L.Ed.2d 216 (emphasis added). Prosecuting an information under an unconstitutional statute is a constitutional defect affecting the jurisdiction of the trial court.

In this case, Fireman is not challenging the sentence imposed or the authority of the district court to impose an enhanced sentence. Instead, he is challenging the constitutional validity of his conviction on the grounds that "the judgment of conviction is void for want of jurisdiction of the trial court to render it." *Waley v. Johnston*, 316 U.S. 101, 104-05, 62 S.Ct. 964, 86 L.Ed. 1302 (1942). "[The legislative] history makes clear that § 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." *Davis v. United States*, 417 U.S. 333, 343-44, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974); *accord United States v. Hayman*,

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[2] This rule states, in pertinent part, that:

> Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. . . . The following must be raised prior to trial:
>
> . . . . . .
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); . . .

342 U.S. 205, 219, 72 S.Ct. 263, 96 L.Ed. 232 (1952) ("[T]he sole purpose [of section 2255] was to minimize the difficulties encountered in habeas corpus hearings by affording the *same rights* in another and more convenient forum.") (emphasis added). This is the traditional purpose of the writ of habeas corpus. *See Ex Parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1880). Thus, the United States' reliance on *Knight v. United States*, 37 F.3d 769 (1st Cir.1994) and *Suveges v. United States*, 7 F.3d 6 (1st Cir.1993) is also misplaced.[3]

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[3] In *Knight*, the First Circuit emphasizes that a section 2255 motion is not a substitute for direct appeal. In that case, the petitioner alleged error on the part of the district court in the application of the sentencing guidelines. This claim was never raised on direct appeal. Because the error, if any, did not constitute "a complete miscarriage of justice," the court held that the petitioner was barred because of procedural default.

Suveges is cited by the United States for the proposition that the cause and prejudice standard of *Frady* applies to procedural default of a jurisdictional claim. In that case, the petitioner failed to object or directly to appeal the district court's imposition of an enhanced supervised release term. Later, on his section 2255 motion, the petitioner averred that the district court failed to provide the statutorily required informational notice and, therefore, could not impose the enhanced sentencing term. The court held that since the petitioner failed to raise the objection earlier, such failure was a procedural default. In support of his holding, the court cites to *Ford v. United States*, 983 F.2d 897, 898 (8th Cir.1993) (per curiam), which held that a section 2255 petitioner is barred from raising sentencing errors in a section 2255 motion that could have been raised on direct appeal without a showing of cause and actual prejudice. The holding of *Suveges* cannot be extended to preclude collateral attack of a conviction on the ground that jurisdiction to hear the matter was lacking due to the unconstitutionality of the statute under which the petitioner was convicted.

[5, 6] The United States is correct that procedural errors and, generally, constitutional claims must be objected to and raised on direct appeal. *Knight* establishes that "[n]ormally, failure to raise a constitutional issue on direct appeal will bar raising the issue on collateral attack unless the defendant can show cause for the failure and actual prejudice." *Knight*, 37 F.3d at 774 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 [111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991)]). There are, however, several exceptions to the general principle that "the writ of habeas corpus will not be allowed to do service for an appeal." *Sunal v. Large*, 332 U.S. 174, 178, 67 S.Ct. 1588, 91 L.Ed. 1982 (1947). These are: first, when the conviction was obtained under an allegedly unconstitutional federal statute, *id*; second, when the conviction was imposed by a federal court whose jurisdiction over the person or offense was improper, *id*; third, when the trial or sentence violated constitutional protections, *id.* at 178-79, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982. This case falls within the first exception. Collateral attack upon a guilty plea is permissible "where on the face of the record the court had no power to enter the conviction or impose the sentence." *Broce*, 488 U.S. at 569, 109 S.Ct. 757, 102 L.Ed.2d 927.

[7] In some cases, even though one of the exceptions applies, the petitioner has been required to raise the claim on direct appeal when an appellate procedure was available for the correction of the error. *See, e.g., Sunal*, 332 U.S. at 179, 67 S.Ct. 1588; *Glasgow v. Moyer*, 225 U.S. 420, 429, 32 S.Ct. 753, 56 L.Ed. 1147 (1912); *Toy v. Hopkins*, 212 U.S. 542, 549, 29 S.Ct. 416, 53 L.Ed. 644 (1909). Direct appeal can be a sufficient mechanism to address the validity of the

law under which the information was found. *See Glasgow*, 225 U.S. at 430, 32 S.Ct. 753; *cf. Menna*, 423 U.S. at 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (holding that a plea of guilty did not waive a challenge to the constitutionality of the prosecution itself and the petitioner could directly appeal in order to challenge the charge on double jeopardy grounds). Nonetheless, in some instances the Supreme Court has permitted the use of the writ of habeas corpus to test the constitutionality of the statute that is the basis of the indictment or information. *See, e.g., In Re Gregory*, 219 U.S. 210, 31 S.Ct. 143, 55 L.Ed. 184 (1911); *In Re Heff*, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905), *rev'd on other grounds*, *United States v. Nice*, 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192 (1916); *Ex Parte Yarbrough*, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274 (1884); *Ex Parte Curtis*, 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232 (1882); *Ex Parte Siebold*, 100 U.S. 371, 25 L.Ed. 717 (1880); *see also Harper*, 901 F.2d at 472; *Prince*, 868 F.2d at 1383; *United States v. Barboa*, 777 F.2d 1420, 1423 n. 3 (10th Cir.1985); *cf. Blackledge*, 417 U.S. at 30, 94 S.Ct. 2098. In this case, Fireman did not file a direct appeal of his conviction based on the unconstitutionality of the statute. Given the constitutional implications posed by Fireman's challenge to this Court's jurisdiction, the Court will consider his claim that section 315 of the Federal Election Campaign Act is unconstitutional.[4]

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[4] As the Supreme Court has stated:

> The validity of the judgment is assailed on the ground that the act of Congress under which the indictments were found are unconstitutional. If this position is well taken, if affects the foundation of the whole proceedings. An unconstitutional law is

C. Revisiting *Buckley v. Valeo*[5]

[8] This case presents the question of whether FECA's $1000 contribution limitation is too low to allow meaningful participation in protected political speech and association and, therefore, is not narrowly tailored to serve the compelling governmental interest of "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

At the core of Fireman's argument is his position that the present Supreme Court would conclude that the $1000 contribution limitation upheld in *Buckley* is now unconstitutional because the distinction made between contributions and expenditures is faulty and the limitation ceiling is no longer narrowly tailored in view of the present cost of campaign publicity. Fireman asserts that the *Buckley* framework was an

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> void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.

Ex Parte Siebold, 100 U.S. at 376-77, 25 L.Ed. 717.

[5] Although Fireman was convicted under several provisions of the FECA, his brief addresses only the $1000 contribution limitation. This, therefore, is the focus of this opinion. The FECA states, in pertinent part, that: "No person shall make contributions to any candidate and his authorized political committee with respect to any election for federal office which, in the aggregate, exceed $1000." 2 U.S.C. § 441a(a)(1)(A).

unreliable precedent to begin with, because it was a plurality opinion whose authority has weakened over time with the change in the composition of the Supreme Court and subsequent opinions by Supreme Court justices indicating their willingness to abrogate the *Buckley* framework. Even were the Court to accept the "predictive demise" argument as an exception to the doctrine of *stare decisis*, an issue upon which this Court expresses no opinion, evaluation of the argument finds it wanting. A majority of the current Supreme Court justices firmly stand behind the *Buckley* framework. Moreover, on this record, Fireman has failed to establish that the $1000 contribution limitation is unreasonably restrictive due to inflation.

1. Buckley v. Valeo is not an Outdated Opinion[6]

Fireman argues that this Court ought not consider itself bound by the Supreme Court's decision in *Buckley*, but ought instead assess the $1000 contribution limitation based on this Court's prediction of the Supreme Court's view of its present constitutionality. In support of his position that revisiting the constitutionality of the statute is appropriate, Fireman refers to a recent Supreme Court case, *Colorado Republican Cam-*

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[6] Contrary to Fireman's assertions, seven Supreme Court justices held constitutional FECA's contribution limitation on individuals supporting a single candidate. Only Justices Burger and Blackmun dissented from the Supreme Court's holding that the $1000 contribution limitation did not violate a contributor's First Amendment rights of freedom of expression and freedom of association. *See Buckley*, 424 U.S. at 235, 290, 96 S.Ct. 612.

paign Committee v. Federal Election Commission, 518 U.S. 604, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996). According to Fireman, "[t]his recent case partially brings to light the split views and dissatisfaction of current Justices as to the adverse and unconstitutional impact of FECA on the First Amendment and indicates that a re-examination of the $1,000 limit on campaign contributions is in order and required." Plt.'s Mem. at 12. In the *Colorado Republican* case, the Supreme Court held, in a plurality opinion, that the First Amendment prohibits application of FECA's party expenditure provision to independent political party spending made without coordination with any candidate.[7] The plurality opinion firmly relies on the principles articulated in *Buckley* regarding individual expenditure limitations to support its position that independent expenditures by political parties do not present the corruption concerns that justify contribution limitations. *Colorado Republican*, 518 U.S. at 614-16, 116 S.Ct. 2309, 135 L.Ed.2d 795.

This opinion does not call *Buckley* into question. Instead, *Colorado Republican* reaffirms the central holding of *Buck-*

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[7] This opinion addresses an issue not reached in *Buckley*: the constitutionality of FECA's provisions dealing with political parties. In the end, seven justices held that section 441a(d)(3), as applied to independent political party spending, violates the First Amendment. Four justices (Rehnquist, Scalia, Kennedy, and Thomas) would have gone further than the plurality opinion and found that section 441a(d)(3) on its face is unconstitutional, believing that the issue of coordinated expenditures and independent expenditures by political parties was properly before the Court. For these justices, political party spending is analogous to candidate expenditure and, per *Buckley v. Valeo*, the First Amendment prohibits its regulation.

ley that contributions and expenditures—i.e., the giving of money and the spending of the money raised—are substantively different. The Court again observed that "restrictions on contributions impose 'only a marginal restriction upon the contributor's ability to engage in free communication,' because the symbolic communicative value of a contribution bears little relation to its size and because such limits leave 'persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.'" *Id.* at 615, 116 S.Ct. at 2315 (internal citations omitted) (quoting *Buckley*, 424 U.S. at 20-21, 28, 96 S.Ct. 612, 46 L.Ed.2d 659.) Concerning expenditures, however, "the Court has said that restrictions on independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and 'represent substantial . . . restraints on the quantity and diversity of political speech.'" *Id.* (quoting *Buckley*, 424 U.S. at 19, 96 S.Ct. 612, 46 L.Ed.2d 659). The political quid pro quo concerns that provide a constitutionally sufficient basis to justify contribution limitations and the associated restriction upon political speech are constitutionally insufficient to justify expenditure limitations.

Presently, the only Supreme Court Justice who advocates the replacement of the *Buckley* dichotomy between contributions and expenditures is Justice Thomas. *See Colorado Republican*, 518 U.S. at 634-44, 116 S.Ct. 2309, 135 L.Ed.2d 795 (Thomas, J., concurring in the judgment and dissenting in part). Although Chief Justice Rehnquist and Justice Scalia

join parts of Justice Thomas's opinion, they specifically **do not** join the part of his opinion where he rejects the *Buckley* framework and advocates its replacement. *Colorado Republican*, 518 U.S. at 631, 116 S.Ct. 2309, 135 L.Ed.2d 795. Contrary to Fireman's assertions, the Supreme Court has not abrogated the *Buckley* framework nor does *Colorado Republican* extend an invitation to this Court to revisit the statute's constitutionality.

2. Difference in Degree or Difference in Kind

Fireman argues that the $1000 contribution limitation can no longer be deemed a narrowly tailored means to meet a compelling governmental end. On the present record, this argument fails. In *Buckley's* discussion regarding the overbreadth challenge to the contribution limitations, the Supreme Court held that the contribution level chosen by Congress is not invalid nor is the Court to select a different limit if the interest underlying the law is constitutionally sufficient and the distinction is one of degree and not kind. *See Buckley*, 424 U.S. at 30, 96 S.Ct. 612, 46 L.Ed.2d 659.

To explain its analysis concerning differences in degree versus differences in kind, the Supreme Court cited two of its opinions regarding the constitutional validity of state legislation restricting a voter's freedom to change parties in order to prevent "raiding." In *Rosario v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), the Supreme Court held that a state law requiring a voter to enroll in the party of her choice thirty days before the general election in order to vote in the next party primary was constitutional. On the other

hand, in *Kusper v. Pontikes*, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973), the Supreme Court held that a state law prohibiting a person from voting in the primary election of a political party if she voted in the primary of any other party within the preceding 23 months was unconstitutional, as it imposed a substantial restraint on her right of free association and was not justified by the government's interest in preventing raiding. The Supreme Court upheld the restriction in *Rosario* because it did not " 'lock' a voter into an unwanted pre-existing party affiliation from one primary to the next." *Rosario*, 410 U.S. at 759, 93 S.Ct. 1245, 36 L.Ed.2d 1. Since the legislation in *Kusper* did exactly that, it was different in kind from the legislation at issue in *Rosario*. In *Rosario*, the issue to be considered was "whether the time limitation imposed by [the statute] is so severe as itself to constitute an unconstitutionally onerous burden on the petitioners' exercise of the franchise or on their freedom of political association." *Rosario*, 410 U.S. at 760, 93 S.Ct. 1245, 36 L.Ed.2d 1. The court held the enrollment scheme constitutional despite the long period between the deadline for enrollment and the next primary election, as the governmental interest—to ensure the integrity of the electoral process—was constitutionally sufficient and the enrollment deadline was sufficiently related to this legitimate purpose.

A contribution limitation such as the one at issue here is analogous to the enrollment deadline in *Rosario*. It does not impose an absolute prohibition on campaign contribution but, like the enrollment deadline, requires a court to consider whether the contribution limitation imposed by FECA is so severe as to constitute an unconstitutionally onerous burden

on a contributor's freedom of political association or expression. This is the inquiry the Supreme Court made in *Buckley*, concluding that the $1000 limitation was a matter of degree, not kind, was within Congress' authority to determine, and did not impose a constitutionally onerous burden on a contributor's freedom of expression or association.[8]

True, the Supreme Court also stated, "[C]ontribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21-22, 96 S.Ct. 612, 46 L.Ed.2d 659. Building upon this language, Fireman asserts that this Court ought reopen the issue as "the increase in cost of political advertisements since 1976 has resulted in a difference in kind. The effect is now a violation of the First Amendment protection of expression and this Court should so hold." Plt.'s Reply Mem. at 13.

Fireman offers a so-called "expert" affidavit from Alan B. Johnson, Senior Vice President, Director of Media Services for Mullen Advertising in Boston, Massachusetts, to show the changes in market rates for a variety of paid media from 1976 to 1997. Fireman offers this affidavit to show how the

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[8] The Supreme Court's conclusion that the $1000 contribution limitation would not severely impact political dialogue was based, as least in part, on evidence showing that most contributors make contributions of $1000 or less. *See Buckley*, 424 U.S. at 21 n. 23, 26 n. 27, 96 S.Ct. 612. Statistical findings submitted by the parties established that only 5.1% of the total contributions raised in 1974 were obtained in amounts in excess of $1000. *Buckley*, 424 U.S. at 21, n. 23, 96 S.Ct. 612, 46 L.Ed.2d 659.

cost of inflation has diminished the value of the $1000 contribution. Assessing the present cost of various paid media against the $1000 contribution limitation, it is apparent, Fireman argues, that the cost of reaching the public has changed dramatically since 1976 so that a $1000 contribution limitation established in 1974 is no longer narrowly tailored to meet the government's compelling interest in 1997.

Fireman also cites several federal court opinions concluding that state contribution limitations were too low, constituting a difference in kind from the limits permitted in *Buckley*, and, therefore, impermissibly infringed on an individual's First Amendment rights of expression and association. *See Carver v. Nixon*, 72 F.3d 633, 644 (8th Cir. 1995) (state had failed to provide any evidence to show "why it was necessary to adopt the lowest contribution limits in the nation and restrict First Amendment rights of so many contributors" in order to meet the government's compelling anti-corruption interest); *Day v. Hayes*, 863 F.Supp. 940, 952 (D.Minn.1994) (Magnuson, J.), *aff'd in part, rev'd in part on other grounds*, 34 F.3d 1356 (8th Cir.1994) (holding the $100 limits on individual contribution to a political committee or political fund unconstitutional).

Finally, Fireman quotes from the Supreme Court's decision in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 n. 5, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981), "The value of the right to associate is illustrated by the cost of reaching the public."

None of these arguments is persuasive.

Despite the economic truth of Fireman's affidavit, this Court is reluctant to conclude from this evidence alone that the $1000 contribution limitation has drifted from a difference in degree to a difference in kind. On this record, Fireman's argument regarding the present day impact of the $1000 contribution limitation is speculative. Certainly the language of *Buckley* requires a court to consider how the contribution limitation affects the financing of political campaigns, but such assessment should occur in a evidentiary context of actual figures on costs, contributions, and expenditures in order fully to assess the impact. No evidence has been put forth to show a severe impact on political dialogue or effective advocacy. *See Buckley*, 424 U.S. at 21-22, 96 S.Ct. 612, 46 L.Ed.2d 659. There is no evidence in the record indicating that the present $1000 contribution limitation is causing a "dramatic adverse effect on the funding of campaigns and political associations."

For the *Buckley* court, the cost of different modes of communication was primarily relevant to the consideration of the constitutionality of expenditure limitations, not contribution limitations.

> The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The $1,000 ceiling on spending "relative to a clearly identified candidate" would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any signifi-

> cant use of the most effective modes of communication.

Id. at 19, 96 S.Ct. 612, 46 L.Ed.2d 659 (citations omitted). Fireman overlooks this distinction.

While recognizing that contribution limitations do impact freedom of expression, the Supreme Court apparently considers such a limitation to be "only a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20, 96 S.Ct. 612, 46 L.Ed.2d 659. Nowhere in the opinion or in subsequent opinions does the Supreme Court compare the costs of political advertising with the contribution limitations as a rubric for assessing the constitutionality of such limitations. Instead, the Supreme Court recognizes "the important role of contributions in financing political campaigns," *see Buckley*, 424 U.S. at 21, 96 S.Ct. 612, and puts forth general principles to guide analysis of whether a contribution limitation is narrowly tailored to achieve the government's compelling interest.

The evidentiary record in both the *Carver* and the *Day* cases varies considerably from the evidentiary record in *Buckley* and the single affidavit presented in this case. While helpful in demonstrating that some contribution limitations can be found unconstitutional pursuant to *Buckley*, neither of these decisions in any way undermines its holding.

Finally, Fireman's reliance upon the statement in *Citizens Against Rent Control* is misplaced. The language he selects comes from a footnote in the part of the opinion where the

Supreme Court is discussing its historical recognition of the value of freedom of association as a vehicle for enabling people to communication their ideas. It does not support Fireman's proposition that by comparing the costs of advertising with the limits on contributions the constitutional validity of the limitation can be ascertained.

In *Citizens Against Rent Control*, the Supreme Court determined that the government interest—to preserve voter confidence in the ballot referendum process—was not compelling and the contribution limitation was not the least restrictive means for achieving that interest. The contribution limitation's impact on the ability to purchase political advertising was not, however, the basis for the Supreme Court's ruling of unconstitutionality. *See Citizens Against Rent Control*, 454 U.S. at 296-99, 102 S.Ct. 434, 70 L.Ed.2d 492. *Citizens Against Rent Control* is not a shift away from the Supreme Court's holding in *Buckley* but a reaffirmation of its underlying tenets.

> *Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate. . . . *Buckley* does not support limitations on contributions to committees formed to favor or oppose ballot measures.

Id. at 296-97, 102 S.Ct. 434.

For this reason, as well as the fact that the Supreme Court does not appear to be moving away from the *Buckley* framework, this Court **DENIES** Fireman's section 2255 petition.

APPENDIX D.

United States Court of Appeals
For the First Circuit

No. 98-2057

SIMON C. FIREMAN,

Petitioner, Appellant,

v.

UNITED STATES,

Respondent, Appellee.

Torruella, Chief Judge,
Campbell, Senior Circuit Judge,
Selya, Boudin, Stahl, Lynch* and Lipez,
Circuit Judges.

ORDER OF COURT

Entered: April 9, 1999

Petitioner's request for a rehearing and/or a rehearing en banc of this court's order, dated February 25, 1999, is denied.

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* Judge Lynch is recused and did not participate in the consideration of this matter.

By the Court:

/s/ Phoebe Morse

Clerk.

[cc. Mr. Goldings, Mr. Jacobs and Mr. O'Connor.]

APPENDIX E.

TRANSCRIPT REFERENCES OF DISTRICT COURT ENCOURAGEMENT TO PROCEED FURTHER

THE COURT: —it's win or lose on the constitutionality of the statute as applies to Mr. Fireman.

MR. GOLDINGS: Precisely.

THE COURT: Lose on that you can appeal.

October 14, 1997 Hearing,
p. 3, lines 15-18
(emphasis added)

THE COURT: . . . and then Mr. Fireman has the best record he can have because he can then appeal the denial of the habeas. I don't know that he's entitled to anything else. He can appeal that and then we'll see what the court of appeals says and the like.

Ibid., p. 10, lines 3-8
(emphasis added)

THE COURT: If things go against you, you'll have a record.

Ibid., p. 11, lines 18-20

THE COURT: Aren't we—and I know you mean this Court no disrespect, but in face of Buckley, am I not simply a way station to appellate review?

December 15, 1997 Hearing,
p. 5, lines 6-8
(emphasis added)

THE COURT: And, Mr. Fireman is going to have to take an appeal if he, from the decision of the district court, if he is serious about pressing this.

Ibid., p. 11, lines 1-3
(emphasis added)

THE COURT: That way Mr. Goldings can go ahead and appeal. The fact that his appeal will spur me to write whatever it is I want to write, if anything, more time will go on, he can get on with representing Mr. Fireman.

Ibid., p. 14, lines 4-8
(emphasis added)

THE COURT: I'm going to technically take the matter under advisement. If you do not—and I will either then order judgment to enter based on the record without an opinion, because the press of business has led me off to something else and that's the best I can do, or there will be an opinion and that will be basis for the judgment. That way people don't have to appeal until I've got a judgment out there and I'll take it under advisement.

Ibid., p. 15, line 19-p. 16, line 2
(emphasis added)

APPENDIX F.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	
v.	Criminal No. 96-10187-WGY
SIMON C. FIREMAN and AQUA-LEISURE INDUSTRIES, INC.	

Affidavit of Alan B. Johnson

I, Alan B. Johnson, hereby depose and state:

1. I develop, implement and manage programs using paid media to advertise client messages to their desired target audiences.

2. I have been actively involved in the planning and purchase of such media programs since 1970 and have been employed by some of the country's largest and most respected advertising firms, including Benton & Bowles; Geer, DuBois and Bozell, Jacobs Kenyon & Eckhardt. I currently serve as Senior Vice President, Director of

Media Services for Mullen Advertising, a position I have held for eleven years.

3. Mullen Advertising, located in Boston, Massachusetts, is an advertising agency dealing with both national and local advertising accounts. We place approximately $150 million annually in paid television, radio, magazine, newspaper and outdoor advertising. In the course of our business, therefore, we regularly monitor the costs of advertising in all major media. All of these activities are carried out with my direct involvement or supervision.

4. I was asked by counsel for Simon Fireman, a defendant in this matter, to research current market rates for a variety of paid media and to compare the current rates to those in force for 1976 - 1977, with appropriate adjustments to reflect any changes in the size of each medium's audience. In short, I was asked to assess the impact of inflation on the ability of a constant dollar expenditure to create a "consumer" advertising impression. The results of my search and analysis are attached to this Affidavit.

5. To assess inflationary impact across the major media categories I utilized the resources of the American Association of Advertising Agencies. This association is the official organization of the advertising industry in the US, with membership of more than 4,000 businesses. Among its services, the AAAA collects a wide range of business information and maintains this in a library accessible to all members. In researching this project, I

availed myself of the historical media cost information held by the AAAA, and periodically published by them in their *Media Letter* and *AAAA Bulletin*. The information resources of the AAAA are commonly acknowledged in the industry to be among the most complete and accurate available, and are routinely used and quoted by professionals in the field.

I also used *Media Dynamics*, an annual compendium of media cost and audience information, to gauge the historical changes in audience size for the various media categories evaluated. Like AAAA information, this source is widely used and is regarded as reliable and accurate by media professionals.

6. For specific newspaper cost and circulation information I relied upon the published rate cards of the individual newspapers for the years 1976 and 1997. These rate bulletins are published by the newspapers and are used to govern pricing and policies for all advertisers. They are indisputably the most accurate source of rate and circulation information available. I have attached a copy of one rate card for the Court's information.

Signed under the penalties of perjury this 5th day of December, 1997.

/s/ Alan B. Johnson
Alan B. Johnson

Media Cost Inflation
1976 - 1997
Adjusted For Changes In Audience Size

Newspaper Cost Inflation

Source: Published rate cards of specified newspapers

Medium	1976 Page Cost	1997 Page Cost	% Cost Increase	Circulation Change	Adjusted % Cost Increase
Boston Globe					
- Weekday	$6,829	$36,603	436%	+6%	406%
- Sunday	7,772	43,520	341%	+27%	341%
NY Times					
- Weekday	$12,288	$73,710	500%	+31%	358%
- Sunday	14,568	82,668	467%	+16%	389%
Washington Post					
- Weekday	$6,971	$62,964	803%	+57%	475%
- Sunday	7,713	85,351	1010%	+60%	592%
LA Times					
-Weekday	$ 9,000	$75,400	738%	+2%	718%
- Sunday	10,800	93,428	765%	+23%	605%
SF Chronicle					
- Weekday	$7,248	$45,666	530%	+6%	493%
- Sunday	8,741	53,664	514%	-1%	519%
Chicago Tribune					
- Weekday	$8,183	$59,976	633%	+1%	628%
- Sunday	9,824	84,168	757%	-7%	818%

Media Cost Inflation
1976 - 1997
Adjusted For Changes In Audience Size

General Media Cost Inflation

Sources: American Association of Advertising Agencies
Media Dynamics, Inc.

Medium	1977 Value	1997 Cost	Audience Change	Adjusted % Cost Increase
Network TV[1]	$100	$318	-33%	381%
Magazines[2]	$100	$325	N/C	225%
Local TV[3]	$100	$275	-33%	317%
Local Radio[3]	$100	$268	N/C	168%
Outdoor[4]	$100	$328	N/C	228%

(1) Average of ABC, CBS and NBC networks reflecting all dayparts - early morning, day, news and prime.

(2) Average of a representative sample of national magazines.

(3) Average for locally purchased spots in markets across the US and representative of all dayparts.

(4) Average of bulletins (14' x 40') and posters (12' x 24') in markets across US.